

No. 3426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY 5'

HIND, ROLPH & COMPANY (a copartnership),
and 1,727,783 feet of lumber loaded on board
the schooner "LEVI W. OSTRANDER", and
FIDELITY DEPOSIT COMPANY OF MARYLAND
(a corporation),

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

PETITION OF APPELLANTS
FOR MODIFICATION OF DECISION AND JUDGMENT.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Kohl Building, San Francisco,

*Proctors for Appellants
and Petitioners.*

FILED

JUL 30 1920

F. D. MONCKTON,
CLERK

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Appellee and Cross-Appellant.

PETITION OF APPELLANTS

FOR MODIFICATION OF DECISION AND JUDGMENT.

*To the Honorable William B. Gilbert, Presiding Judge,
and the Associate Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Appellants respectfully suggest that, by an oversight on the part of the Court, it has failed to render a decision of this cause in accordance with its own findings

of the facts and, in consequence of said oversight, has failed to modify the decree of the Court below by disallowing the demurrage awarded after November 30th.

The Court, in its opinion, states correctly:

“The demurrage claimed by the appellee was \$250 per day for three periods; first, from August 25 to October 13, 49 days; second, from October 13 to November 24, 27 days * * *; third, for 5 days after November 24.”

The claim of the appellee extends, therefore, to and including November 30th.

The Court affirmed the decree of the Court below in denying demurrage from August 25 to October 13. Discarding this item, therefore, it appears that *the demurrage claimed by the appellee* was \$250 per day for the second period of 27 days, and the third period of 5 days, making a total claim for 32 days.

Apparently the Court overlooked the fact that, in awarding demurrage for 45 days, the Court below had awarded demurrage for 13 days not claimed by appellee, and that its decree was, therefore, \$3250 in excess of the damages claimed by the appellee.

The third period of 5 days is the period between November 24, when the schooner had completed loading, and November 30, when the appellee filed a libel for demurrage and attached the cargo.

If we read the opinion of the Court correctly, it was the intention of the Court to affirm the conclusions of the Court below in so far as they are co-extensive with appellee's claim for demurrage, but we think that the

Court overlooked the discrepancy between appellee's claim for demurrage, for 32 days, and the award of the Court below for 45 days. The 13 days in excess are within the period during which, as the Court has found, "*for other reasons* the schooner was detained until December 26, when she sailed from Port Angeles".

We are justified in presuming that, within the scope of "other reasons" referred to in its opinion, the Court intended to exclude the reasons previously mentioned, upon which appellants' liability is predicated, and to include reasons for which appellants are not responsible. These reasons were fully and, we believe, conclusively covered in the Brief for Appellants, pp. 40-58, where we showed that the claim for these 13 days was *waived by counsel in open Court* at the trial, because "*the cause of all the delay during December*" was that "*she was held by the War Trade Board*" (Mr. Ostrander's Testimony, Apostles 142-143).

Counsel for appellee stated in Court:

"Our claim for delay consists of 5 days after November 24th, * * * but *we are making no claim for the subsequent time that the Government would not allow us to proceed.*" (Ap. p. 146.)

We bow to the decision of the Court holding appellants liable for the delay during the period from October 13 to November 24, when the vessel completed her loading, and even to November 30, when appellee filed the libel and attached the cargo; but we earnestly believe that the award of demurrage for 13 days beyond November 30 is plainly unjust, and that the Court

will correct an apparent oversight which is costly to appellants, and will modify its decision upon due consideration of this phase of the case.

Accordingly, we suggest and submit that the decision should be modified so that, instead of reading: "The decree is affirmed", it will read as follows:

"Having found that the demurrage claimed by the appellee for 49 days was properly denied by the court below, and the demurrage claimed by the appellee for 32 days was properly awarded by said Court, the decree of the District Court is modified by decreasing the amount awarded thereby by \$3250, making the award the total sum of \$8000, and as so modified will stand affirmed."

Dated, San Francisco,

July 15, 1920.

Respectfully submitted,

ANDROS & HENGSTLER,

LOUIS T. HENGSTLER,

*Proctors for Appellants
and Petitioners.*

STATEMENT OF WORK

The purpose of this document is to define the scope of work for the project. It is intended to provide a clear understanding of the tasks to be performed, the resources required, and the timeline for completion. This document will serve as a reference for all project activities and will be updated as the project progresses.

Project Name: [Project Name]

Version: 1.0

Prepared for: [Client Name]

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and cross-appellees in the above-entitled cause and that in my judgment the foregoing petition of appellants for modification of decision and judgment is well-founded in point of law, as well as fact, and that said petition is not interposed for delay.

DATED: San Francisco, Cal., July 23, 1920.

LOUIS T. HENGSTLER

of counsel for appellants and
cross-appellees.